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IN THE SUPRME COURT
OF THE STATE OF WASHINGTON

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DIANNE KLEM, as administrator of the estate of Dorothy Halstein,

Petitioner,

vs.

WASHINGTON MUTUAL BANK, a Washington corporation, and

Defendant,

QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a
Washington corporation, and QUALITY LOAN SERVICE
CORPORATION, a California Corporation

Respondents.

SUPPLEMENTAL BRIEF

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INTRODUCTION

PSG attempts to turn a private dispute – in which the jury found PSG 50% negligent – into a jeremiad on the mortgage crisis. The legal issues are simple. The Court should affirm.

The appellate decision – on the two legal issues actually raised in this Court – is remarkably straightforward and correct. On the CPA, PSG failed to prove (1) an unfair or deceptive act or practice that had the capacity to deceive a substantial portion of the public, and (2) causation. PSG failed to argue the first point on appeal, and on the second, it cannot deny that Ms. Halstien was given timely and appropriate notice and her full statutory period prior to the foreclosure sale. The lack of causation alone undermines her CPA claim, no matter what theory she argues.

On the breach of contract claim, the governing law provision in the Deed of Trust obviously cannot convert any alleged violation of Washington law into a breach of contract. While PSG now raises a “duty of good faith” argument that it did not raise in the Court of Appeals, PSG must acknowledge that there is no free-floating duty of good faith untethered from the contract language. Since the contract contains no applicable provisions, the contractual duty of good faith is irrelevant.

SUPPLEMENTAL ARGUMENT

A. PSG failed to establish a CPA violation.

Notwithstanding the barrage of rhetoric from PSG and others, the Court of Appeals' CPA holdings are straightforward:

1. The Deed of Trust Act contains a CPA provision, RCW 61.24.135, which does not make anything PSG alleges here a CPA violation (Unpub. Op. at 18);
2. PSG's arguments about acting impartially or breaching a fiduciary duty (a claim that the trial court plainly dismissed) are conclusory and unsupported by law (*id.*);
3. PSG failed to even argue that these alleged actions had a "capacity to deceive a substantial portion of the public," thus failing to establish a CPA violation (*id.*);
4. PSG's arguments about post-dating notaries fails because Halstien received the full statutory notice period, so "her legal rights were unaffected" (*id.* at 19);
5. "PSG failed to establish that the predated notice caused Halstien's home to be sold at foreclosure before PSG closed the home," so the "harm alleged to PSG was speculative" at best (*id.* at 20).

The last two holdings – that Halstien undisputedly was not harmed by anything that Quality allegedly did or did not do – are dispositive of PSG's CPA claim.

PSG had to prove all five elements of the CPA, an unfair or deceptive act, occurring in trade or commerce, affecting the public interest, damages, and causation. See, e.g., *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778,

780, 719 P.2d 531 (1986) (must prove all elements of CPA claim); *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007) (must prove “but for” causation of damages). PSG does not challenge the appellate court’s holding that Halstien received her full statutory notice period. Compare Petition for Review (PFR) 1-2 with Slip Op. at 19 (“we agree with Quality that Halstien received the full statutory period required for notice and that her legal rights were unaffected”). PSG cannot show causation, so its CPA claim fails.

The Court of Appeals correctly identified PSG’s two claims:

PSG argued at trial that Quality committed a CPA violation [1] by failing in its duty as a trustee to act impartially and [2] by predating and notarizing the notice of sale.

Slip Op. at 17; see also PFR 11. On the impartiality claim, the appellate court first correctly notes that to establish an unfair or deceptive act, PSG had to show either a “per se” violation or an unfair or deceptive act that has the capacity to deceive a substantial portion of the public. Slip Op. at 18 (citing *Hangman Ridge*, 105 Wn.2d at 785-86). Since neither RCW 61.24.135 nor any other statute makes the alleged acts per se violations, the court properly rejected that claim. *Id.*

The court also noted that PSG made only a “conclusory argument that an unfair or deceptive act or practice was shown through evidence that Quality acted impartially and breached a fiduciary duty.” *Id.* at 18. The court correctly found that PSG cited no authority for this element. *Id.* Indeed, this Court will search the Brief of Respondent in vain for argument and authority on this element. BR 29-34. The appellate court properly refused to consider an unsupported, unpreserved argument. Slip. Op. at 18-19 (citing ***First American Title Ins. Co. v. Liberty Capital Starpoint Equity Fund, LLC***, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (citing ***Bohn v. Cody***, 119 Wn.2d 357, 368, 832 P.2d 71 (1992); ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992))).

Moreover, this aspect of PSG's CPA claim was wholly based on an assertion that PSG lost on summary judgment. PSG alleges that Quality violated the CPA by failing in its duty as a trustee to act impartially. Slip Op. at 17; PFR 14. But the trial court ruled on summary judgment that by failing to bring an action to stop the foreclosure sale, PSG waived its claim that Quality breached its duty as a trustee. CP 248 (“Under RCW 61.24.040,

RCW 61.24.130, the elements of waiver have been met here"). On reconsideration, the trial judge reinstated some claims, but reaffirmed her decision that, "[b]y failing to enjoin the foreclosure sale Plaintiff waived its claim that Quality abrogated its duty as a trustee." CP 270. PSG failed to appeal from this decision, and has not raised the issue here. See BR 2; PFR 2. Since PSG had no claim that Quality breached its duty as a trustee at trial, it cannot assert a CPA violation based on such a claim here.

Finally on this point, PSG's CPA theory is faulty and impractical. At the time of the trustee's sale, Quality owed fiduciary duties to both the beneficiary (WaMU) and the grantor (Halstein). See, e.g., BR 30 n.22 (PSG concedes Quality owed fiduciary duty to WaMU).¹ It is not uncommon for a beneficiary to ask that the trustee not postpone a sale beyond the scheduled date without seeking its agreement, and the trustee's fiduciary duty to the beneficiary would ordinarily require the trustee to inquire with the beneficiary before postponing a sale. Because a grantor must work out her financial problems with the beneficiary (not the trustee) or

¹ RCW 61.24.010 was twice amended after February 2008 (when the Halstein foreclosure sale occurred), and currently requires the trustee to exercise only good faith toward the beneficiary and the grantor. RCW 61.24.010(3) & (4). The current statute is not at issue here.

must bring an action to stop the foreclosure sale, telling the grantor to contact her lender is consistent with best practices.

Here, PSG never told Quality that WaMU was non-responsive, never supplied PSG with the signed REPSA, and never showed up at the sale with the signed REPSA in hand. Any of these steps would have permitted Quality to contact the beneficiary and obtain its permission to stop the sale. RP 270-72, 276, 330, 382. Beneficiaries (and trustees) are often faced with false claims of a "signed REPSA," so it is standard practice to insist on seeing the documents. This Court should not hold that it is unfair and deceptive either to honor a beneficiary's instructions not to postpone a sale without seeking its authorization, or to advise a grantor to contact her lender. PSG's first CPA claim falls.²

Turning to the predated-notice issue, the Court of Appeals correctly identified the relevant law:

Under RCW 61.24.030(8), the trustee must transmit written notice of default to the grantor by mail and by posting a copy of the notice (or personally serving it) at least thirty days before notice of sale is recorded, transmitted, or served.

² The appellate court's correct holding that Halstien suffered no harm because she received her full statutory notice period (discussed immediately below) also bars this claim.

The trustee must record the notice of sale, in the office of the county auditor in which the deed of trust is recorded, at least 90 days before the foreclosure sale. RCW 61.24.040(1)(a).

Slip Op. at 19. The court correctly applied this law to the relevant, undisputed facts (*id.* at 20):

The evidence at trial established the following. The notice of default was posted on October 25, 2007. As November 25 was a Sunday, Quality was required to wait until November 26 before it could record, transmit or serve the notice of sale. Quality sent the notice of sale to Halstien and recorded it in Island County on November 27, 2007. So although Quality predated, signed, and notarized the notice of sale in San Diego, it nonetheless abided by the statutory requirement of waiting 30 days before recording, transmitting, or serving the notice of sale.

The appellate court further explained why PSG failed to prove causation:

Furthermore, PSG failed to establish that the predated notice caused Halstien's home to be sold at foreclosure before PSG closed on the home. The closing date specified in the REPSA was on or before March 28, 2008. Klem testified that the closing was to happen sometime in March. The letter from Greenfield to WaMu stated that the closing date was March 28. There was no testimony that PSG actually planned to close with the buyer earlier than March 28—for example, on March 6. The harm alleged to PSG was speculative. The predated notice issue did not support the CPA claim.

This is unremarkably correct. PSG's claim is really that Halstien was entitled to more than the statutory period. But it is not a CPA violation to fully honor her legal rights. This claim fails.

B. PSG's breach of contract claim is frivolous.

The appellate court correctly held that a provision stating that Washington law shall govern the Deed of Trust does not and cannot convert any alleged violation of Washington law into a breach of contract. Slip Op. at 15-17. As the contract language shows, "no contract term . . . made it a breach of the deed of trust for either party to 'not follow' Washington law" (*id.* at 16):

16. Governing Law; Severability; Rules of Construction.

This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

Ex 9 (Deed of Trust at 12, ¶ 16).

On its face, this provision makes Washington's law the governing law in the event of a dispute. It nowhere states a contractual undertaking by the trustee to comply with Washington law. PSG's breach of contract claim is frivolous.

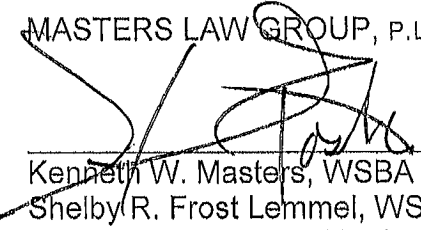
While PSG did not raise "duty of good faith" argument in the Court of Appeals, it does so here. The Court need not reach this argument. See, e.g., **Fisher v. Allstate Ins. Co.**, 136 Wn.2d 240, 252, 961 P.2d 350 (1998). In any event, PSG must acknowledge that there is no free-floating duty of good faith untethered from the contract language. E.g., **Badgett v. Security State Bank**, 116 Wn.2d 563, 569-70, 807 P.2d 356 (1991). Since the contract contains no applicable provisions, the contractual duty of good faith is irrelevant.

CONCLUSION

For the reasons stated above, this Court should affirm. .

RESPECTFULLY SUBMITTED this 3rd day of August,
2012.

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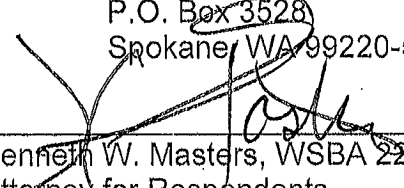
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